No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ANTHONY BROOKS,

Petitioner

-against-

STATE OF GEORGIA,

Respondent.

APPENDIX

STEPHEN B. BRIGHT
Suite 202
419 Seventh Street, N.W.
Washington, D.C. 20004

GEORGE H. KENDALL
CANAN, BURNS & O'TOOLE, P.C.
1521 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 328-3100

COUNSEL FOR PETITIONER

denies petitioner his right to due process as well as his right to rational review of his sentence of death guaranteed by the Eighth and Fourteenth Amendments to the Constitution.

Therefore, because the discretion of the jury was not sufficiently channeled and directed to avoid the arbitrary imposition of the death penalty, petitioner was sentenced to death in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

CONCLUSION

For the reasons stated herein, William Anthony Brooks asks that a writ of certiorari issue to review the decision of the court below.

Respectfully submitted,

Stephen B. Bright
Suite 202
419 Seventh Street, N.W.
Washington, D.C. 20004
(202) 638-4798

George H. Kendall,
CANAN, BURNS & O'TOOLE, P.C.
1521 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 328-3100

Counsel for Petitioner

JJ). As Mr Justice Marshall stated:

> Such a defect could not be curred by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it has been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

446 U.S. at 437 (Marshal, J., concurring)

The Georgia Supreme Court upheld the finding of the jury under subsection (b) (7) upon remand from the United States Supreme Court on the basis of its conclusion that the victim was tortured, 271 S.E.2d at 173, */ an assertion which was made at the sentencing hearing by the prosecution or found by the jury. The Court's speculation as to what the jury found based upon its review of a cold record is inconsistent with Godfrey, Gregg, Furman and Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Stewart, Powell and Stevens, JJ.) See also Presnell v. Georgia, 439 U.S. 14 (1979); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). In the absence of any specific and precise findings by the triers of the facts, an appellate court may not make belated findings of fact on the basis of evidence in the record below and use those findings to correct or bloster the verdict. Speculation on appeal as to the basis of the jury's sentence

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*/ The Georgia Supreme Court also based its reaffirmation of petitioner's death sentence upon its decision in Gates v. State, 244 587, 599, 261 S.E.2d 349, 258 (1979), that were two or more statutory aggravating circumstances and found, the failure of one does not invalidate the sentence of death. However, the Court of Appeals for the Fifth Circuit reached the opposite conclusion in Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980).

Georgia, supra, in that the instructions "gave the jury no guidance concerning the meaning of any of Section (b) (7)'s terms. In fact, the jury's interpretation of Section (b) (7) can only be the subject of sheer speculation." Id at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Therefore, petitioner is entitled to a new sentencing hearing at which the sentencer's discretion is proerly directed and channeled as required by Furman, Gregg, and Godfrey.

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

Godfrey, supra at 437 (Marshall, J., concurring) [citations omitted]. The fact that the jury found depravity of mind "to the victim" in its written findings of aggravating circumstances after being instructed on aggravated battery strongly indicates that the jury did not understand the statutory aggravating circumstances or properly apply them to the facts of petitioner's case in deciding to give him the death penalty.

Because the discretion of the jury was not properly guided, petitioner's sentence of death must be vacated. Under Ga. Code Ann. Sections 26-3102, 27-2534.1(c), the sentencing authority in death cases is the jury. Once the penalty has been imposed in the exercise of unbridled discretion by the jury, it cannot be salvaged by appellate review. Here, as in Godfrey, "the standardless and unchanneled imposition of the death sentences in the uncontrolled discretion of a basically uninstructed jury . . . was in no way cured by the affirmance of those sentences bythe Georgia Supreme Court." 446 U.S. at 429 (opinion of Stewart, Blackmun, Powell and Stevens,

application of the statue to the facts of the case.

The trial court also instructed the jury as follows:

> In arriving at your determination, you are authorized to consider all the evidence received throughout this trial presented by the State and the defendant. You are authorized to include in your consideration the facts and circumstances, if any, in mitigating and aggravation.
>
> Mitigating circumstances are those which do not constitute a justification or execuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral cuplability or blame.
>
> Aggravating circumstances are those which increase the guilt or enormity of the offense or add to its injurious consequences.

Tr. 886-87, R. 28.

The jury was provided with a form permitting it to base a recommendation of death upon a single aggravating circumstance, a combination of aggravating circumstances or multiple aggravating circumstances independent of one another. The jury recommendation stated the following statutory aggravating circumstances: "armed robbery, and rape, and the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim." Tr. at 890 [emphasis added]. There was no finding of aggravated battery or torture by the jury.

Petitioner contends that the trial court did not properly guide the discretion of the jury as required by the Eighth and Fourteenth Amendments to the Constitution of the United States. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980).

The trial court's instruction on aggravating circumstances did not indicate to the jury that its consideration of aggravating circumstances was limited to those alleged by the state as being the basis for the death penalty in petitioner's case. With regard to the aggravating circumstance contained in section (b) (7), the trial court's instruction has the same defect found to exist in Godfrey v.

People v. Bernette, 197 N.E.2d 436(Ill. 1964); Sier v. State, 417 P.2d 803, 805 (Okla. Crim. App. 1973). He argued that petitioner should be given death because he had a lawyer and the decedent did not. Tr. 867. And he repeatedly played on the climate of fear and tension in the community, finally urging the jurors to send a message to "William Brooks . . . and every other criminal like him, by voting for electrocution. Tr. 871. Indeed, it cannot be said that any argument made by the prosecutor was beyond criticism.

Taken individually, each argument constitutes blatant, improper conduct. Taken as a whole, the argument contains a collection of prejudicial misconduct exceeding that in any reported case -- capital or not. This argument cannot be permitted to stand as a constitutional permissible closing argument in a capital punishment case. See Gardner at 358. Because the holding of the Georgia courts in this case conflict with the decisions of many other state and federal courts and because this is a capital case, this Court should grant review of this petition.

III. THE PENALTY OF DEATH IS INVALID IN PETITIONER'S CASE BECAUSE THE TRIAL COURT DID NOT PROPERLY GUIDE THE DISCRETION OF THE JURY AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner's jury was instructed orally and in writing that it could impose the death penalty if it found any one of three statutory aggravating circumstances contained in Ga. Code Ann. Sec. 27-2534.1. Under subsection (b)(2) of the statute, it was instructed that it could impose death if it determined that the offense of murder was committed in the commission of either or both of two other capital felonies, rape and armed robbery. Tr. at 885-886. It was also instructed that it could return a death sentence pursuant to subsection (b) (7) if it found that "[t]he offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim." Tr. at 886 [emphasis added]. There was no mention of the other two components of (b) (7): depravity of mind or torture. The jury was given no definition of any of the terms of section (b) (7) or any other guidance in the

escape and kill someone else's girlfriend or daughter." Tr. 868-69. Attempt to inflame the emotions of the jury by conjuring up the risk of escape constitutes reversible error. See People v. White, supra, 72 Cal. Rptr. at 878-79, 446 P.2d at 998 (argument in a penalty proceeding that the defendant should be executed because he was likely to escapt a second time held to be improper and unduly speculative); See generally Brown v. Estelle, supra, 468 F. Supp. at 48.

The prosecutor went on to argue that the jurors should vote to execute Brooks to save themselves the cost of housing, feeding and clothing him in prison. Tr. 869. Appeals to the jurors at taxpayers are "clearly indefensible" in capital cases and require that petitioner's death sentence be vacated. State v. Jordan, 294 P.2d 677 (Ariz. 1956); Commonwealth v. Clark, 185 A.2d 764, 765-66 (Pa. 1936); State v. Owen, 253 P.2d 203, 211-12 (Ida. 1953), overruled in part on other grounds, 486 P.2d 84 (Ida. 1971). Indeed, the principle that a decision maker should not have a financial interest in the outcome of a case -- and under no circumstances should be reminded of any interest he has — is so firmly entrenched that it is applied even when the consequences of the decision are far less than electrocution. See Tumey v. Ohio, 273 U.S. 510 (1927) ($100 fine); Finney v. G.C. Murphy Co., 161 A.2d 385 (Pa. 1960) ("entirely improper" to argue in tort case that judgment for plaintiff would require increase in insurance premiums); West v. State, 150 S.W.2d 363 (Tex. Ct. Civ. App. 1941) (argument in condemnation proceeding that, as taxpayers, jurors will have to cover judgment requires reversal even without objection); Lufkin v. City of Bakersfield, 20 P.2d 788 (Cal. Ct. App. 1933) ("exceedingly improper" to tell juror that judgment against city would be vorne by taxpayers.

The prosecutor also appealed to the jury to impose the death penalty out of sympathy for the decedent and her family, who would not have her home for Thanksgiving which was the week after the trial. Tr. 861. Such arguments have repratedly been held improper. See Williams v. Henderson, 451 F. Supp. 328, 332 (E.D.N.Y. 1978);

United States, 419 F.2d 582, 587 (5th Cir. 1969); United States v. Chrisco, 493 F.2d 232, 237 (8th Cir.), cert. denied, 419 U.S. 847 (1974); United States ex rel. Clark v. Pike, 538 F.2d 750, 759 (7th Cir., 1976), cert. denied, 429 U.S. 1064 (1977). Moreover, this argument suggested to the jury that considerations other than the statutory aggravating circumstances could be considered in determining whether to give petitioner the death penalty.

Additionally, the prosecutor's statement of his personal opinions and the decision-making process of his office is also prejudicial because it implies that the prosecutor has additional information not admitted into evidence (the prosecutor had already told the jury this during his opening statement:, Tr. 477-78), see United States v. Somers, 496 F.2d 723, 740 (3rd Cir.), cert. denied, 419 U.S. 832 (1974), and because the jury is likely to give undue weight to the opinion of an elected government representative, Berger v. United States, 295 U.S. 78, 88 (1935).

After providing the jury with all this extrinsic and prejudicial information, the prosecutor emphasized that the jury would not be responsible for petitioner's life if it voted for the death penalty. Tr. 865-66. But it is essential that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." McGautha v. California, 402 U.S. 183, 208 (1971). Arguments seeking to diminish the juror's responsibility and recognition that they alone are to select the proper punishment are therefore improper and defeat the purpose of jury sentencing. People v. White, 72 Cal. Rptr. 873, 878, 446 P.2d 993, 998 (1968) (reversible error for prosecutor to argue that "It is not the 12 of you alone. It is everyone who has had a connection with the case that will have the consequences of the imposition of the maximum penalty.") See also, State v. Jones, 251 S.E.2d 425, 427-28 (N.C. 1979); State v. Mount, 152 A.2d 343, 351 (N.J. 1959).

The prosecutor also argued for execution because of the risk that petitioner might kill a prison guard or a fellow prisoner, or

The prosecutor repeatedly referred to matters outside the record in arguing to the jury the practices of the District Attorney's office in seeking the death penalty, Tr. 862-64; the deterrent value of the death penalty, Tr. 860; and the likelihood of petitioner escaping from prison, Tr. 868-69. Because all of these assertions were not supported by evidence in the record, the arguments were blantantly improper. See Brown v. Estelle, supra at 45; White v. State, 492 S.W.2d 488 (Tex. Ct. Crim. App. 1973); Gilbert v. State, 536 P.2d 929, 932 (Okla. Crim. App. 1975). More significantly, even if the argument had been based on the record, it could only distract the jury from its delegated role of determining whether statutory aggravating circumstances had been established and, if so, whether death was the appropriate punishment. See People v. Love, 17 Cal. Rptr. 481, 486, 366 P.2d 809, 814 (1961), where an argument about the deterrent value of capital punishment was held to be improper; Gregg v. Georgia. v. Georgia, 428 U.S. 153, 186 (1976) ("the value of capital punishment as a deterrent of crime is a complex factual matter the resolution of which properly rests with the legislature"); Embrey v. State, 214 So.2d 567, 570-71 (Ark. 1969) (defendant also unable to present testimony about deterrent value of capital punishment).

After asserting that his office seldom requests the death penalty, the prosecutor outlined for the jury the process by which the District Attorney's office determined the death penalty to be appropriate for petitioner. Only after considering the horrible nature of the crime, the overwhelming proof of guilt and the fact that "there's no chance that William Anthony Brooks will ever be rehabilitated," did the District Attorney's office decide to seek the death penalty, the prosecutor told the jury. Tr. 862-64. This argument not only had no basis in the record, but it improperly injected the weight of the prosecutor's office into the jury's decision-making process. See Brown v. Estelle, supra, 468 F. Supp. at 46. Such an argument is no different in logic or in effect from the statement that "we only prosecute the guilty," which has uniformly been recognized as prejudicial error. See e.g., Hall v.

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MOTION FOR LEAVE TO PROCEED IN THIS COURT IN FORMA PAUPERIS

Petitioner, by and through counsel, moves this Honorable Court, pursuant to Rule 46 of this Court, to permit him to proceed with this action in forma pauperis. As evidence of petitioner's poverty and in accordance with Rule 46, petitioner has submitted a notarized Affidavit of Poverty.

Petitioner prays that this Court grant this motion.

Respectfully submitted,

George T. Kendall
CAHAN, BURNS & O'TOOLE, P.C.
1521 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 328-3100

COUNSEL FOR PETITIONER

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AFFIDAVIT OF ATTORNEY IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, George H. Kendall, being first duly sworn, deposes and states that I am the attorney for the petitioner in the above entitled matter, that in support of petitioner's motion to proceed in this action for a writ of certiorari to the Supreme Court of Georgia without being required to prepay fees, costs or give security therefor, I state that because of petitioner's poverty he is unable to pay the costs of said proceeding or to give security therefor.

I further swear that the information stated below regarding the ability of petitioner to pay the costs of proceeding herein are true:

1. The petitioner is not presently employed. He has been incarcerated since July 1977. Prior to that time, petitioner had various odd jobs, but no regular employment.

2. Petitioner has received within the past twelve months no income from a business, profession or other form of self-employment. He has received nothing in the form of rent payments, interest, dividends or moneys from any other source.

3. Petitioner has no cash and has no checking or savings account.

4. Petitioner owns no real estate, stocks, bonds, notes, automobiles, or other valuable property excluding ordinary household furnishings and clothing.

5. There are no persons who are dependent upon the petitioner for support.

George H. Kendall

Subscribed and sworn to before me this 20th day of July, 1982, by George H. Kendall.

Notary Public

My Commission Expires May 14, 1987